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scarcely less importance in the determination of causes, whether civil or criminal, that the parties immediately affected by them should feel their justice, and propriety, and necessity even, than that they should be absolutely so decided. We know very well that a desire to render a judgment acceptable to the parties to be affected by it, may be carried to such an extent as to become a vice, or a weakness, and thereby most effectually defeat its object. But within reasonable limits, and when pursued by dignified and honorable means, the effort and desire to render governmental administration acceptable to those who are to be affected by it, is certainly to be commended.

I. F. R.

PARIS, July 20th 1867.

RECENT AMERICAN DECISIONS.

Supreme Court of Indiana.

GOTHILF BLOCH v. ABEL ISHAM AND BENJAMIN M. SCHENCK.¹

An agreement between adjoining owners of a town lot, A. and B., that A. might build a party-wall equally upon the land of both, and that whenever B. should build upon his lot so as to use the wall, he would pay one-half of the cost thereof, is not a covenant running with the land so as to entitle C., who had purchased A.'s lot, upon the performance of the condition as to the use of the wall, to sue B. for the money.

THE opinion of the court was delivered by

GREGORY, J.—The case made by the complaint is this: Schenck and Isham, being the owners of adjoining lots in Valparaiso, entered into a written agreement whereby Schenck acquired the right to build one of the walls of a brick store, then in process of erection on his own lot, with one-half of its thickness resting on the lot of Isham; and Isham acquired for himself, his heirs and assigns, the right to use the wall by joining a building thereon, and agreed for himself and them to pay one-half of the original cost of the wall when he or they should use it. Schenck completed the brick store on his lot, with one-half the width of

¹ We are indebted for this opinion to the Hon. R. C. Gregory.—EDS. AM. LAW REG.

one of its walls standing on Isham's lot. Afterward Schenck conveyed his lot and store to Bloch and others, and Bloch subsequently became the sole owner of the lot and its appurtenances; and while he was such owner Isham built a brick building on his own lot, and used the wall in question.

A demurrer was sustained to the complaint. The only question raised below, and here, is, whether Bloch or Schenck has the right to the pay for the wall used by Isham.

The case turns upon the solution of the question as to whether Isham's agreement to pay for one-half of the party-wall is a covenant running with the land.

There is some conflict in the authorities on this point. In *Burlock v. Peck*, 2 Duer (N. Y.) 90, the Superior Court of New York held that such a covenant passed to the grantee of the premises on which the building of the covenantor was erected. It is otherwise held in Pennsylvania: *Ingles v. Bringham*, 1 Dallas 341; *Todd v. Stokes*, 10 Barr 155; *Gilbert v. Drew*, Id. 219; *Hart et ux. v. Kucher*, 5 S. & R. 1. It is claimed that the cases in Pennsylvania turn on a statute. That statute simply provides that "the first builder shall be reimbursed for one moiety of the charge of the party-wall, or for so much as the next builder shall use before he breaks into the wall." There is nothing in this statute which is not embraced in the agreement of the parties in the case in judgment.

Brown v. Pentz, 1 N. Y. Leg. Obs. 24, was never officially reported, and we do not recognise it as authority. But we think that the ruling of the Supreme Court of Massachusetts in *Weld v. Nichols*, 17 Pick. 538, is conclusive on this question. It was there held that the liability to pay for the party-wall was a mere personal liability, and not repugnant to a covenant in a deed that the land was free from incumbrances.

The easement which passed from Schenck to his grantees was the right to the support of the party-wall afforded by that part thereof which rested upon the land of Isham.

Schenck and Isham were not tenants in common of the party-wall, but each owned that part thereof on his side of the line; Schenck advanced the money to build Isham's moiety, on the agreement of the latter that he or his heirs would repay it when he or they should have occasion to use the wall. This is clearly

a mere personal covenant, in no wise connected with or affecting the enjoyment of the lot conveyed to Bloch.

Judgment affirmed with costs.

In the Assize of Buildings, by Henry Fitz Elwyne, first mayor of London, (1 Richard I., A. D. 1189), it is enacted that "when it happens that two neighbors wish to build between themselves a stone-wall, each of them ought to give one foot and a half of his land; and so at their joint cost they shall build a stone-wall between them, three feet in thickness and sixteen feet in height. And, if they wish, they shall make a rain-gutter between them, at their joint cost, to receive and carry off the water from their houses, in such manner as they may deem most expedient. But if they should [not] wish to do so, either of them may make a gutter by himself, to carry off the water that falls from his house on to his own land, unless he can carry it into the king's highway.

"They may also, if they agree thereupon, raise the said wall as high as they may please, at their joint cost. And if it shall so happen that one wishes to raise such wall and the other not, it shall be fully lawful for him who so wishes it to raise the part on his own foot and a half as much as he may please, and to build upon his part, without damage to the other, at his own cost; and he shall receive the falling water in manner already stated.

"And if any one shall build of stone, according to the assize, and his neighbor through poverty cannot, or perchance will not, then the latter ought to give unto him who so desires to build by the assize, three feet of his own land; and the other shall make a wall upon that land, at his own cost, three feet thick and sixteen feet in height; and he who gives the land shall have one clear half of such wall, and may place his timber upon it and build.

"But this assize is not to be granted unto any one so as to cause any doorway, inlet, or outlet, or shop, to be narrowed or restricted, to the annoyance of a neighbor.

"This assize is also granted unto him who demands it as to the land of his neighbor, even though such land shall have been built upon, provided the wall so built is not of stone.

"Also, no one of those who have a common stone-wall built between them, may, or ought to, pull down any portion of his part of such wall, or lessen its thickness, or make arches in it, without the assent and will of the other.

"If any person shall wish to build the whole of a wall upon his own land, and his neighbor shall demand against him an assize, it shall be at his election either to join the other in building a wall in common between them, or to build a wall upon his own land and to have the same as freely and meritoriously as in manner already stated:" Liber Albus of the City of London, Book III., Pt. 2, p. 278 *et seq.*, edited by Henry T. Riley, under the direction of the Master of the Rolls, London, 1859.

This assize or ordinance, from which we have quoted at some length, as the volume is believed to be not generally found in the libraries of this country, exhibits a remarkable degree of efficiency for that early and turbulent day in the police regulations of that great city which, as Lord CAMPBELL says, was "a sort of free republic in a despotic kingdom:" Lives of the Lord Chancellors, 1, 8. The recent destructive fire in the reign of King Stephen, alluded to in Liber Albus, had led to a great improvement in building by the substitution of stone-walls and tiled roofs for the wood, thatch, and straw previously used, and

in the course of this change much dispute had probably arisen as to party-walls and the rights of support and roof-drainage depending thereon. Hence, this assize was ordained, as the preamble states, “*per discretiores viros civitatis, ad contentiones pacificandas.*” It is probable, however, that it only consolidated and enacted into positive law, the previous custom of the city. To this custom, the independent growth of the convenience and necessities of a large and compact city, we prefer to look for the foundation of the present law of party-walls, rather than to the urban servitude of the civil law, *tigni immittendi*, though similar circumstances produced similar laws in both cases, and in later times, no doubt, the just reasoning and mature wisdom of the civil law had great influence in developing the English law of party-walls as well as of other easements.

The custom of party-walls, developed by time and regulated by various statutes, was introduced into this country, together with the process of foreign attachment, the custom of *feme sole* traders, and other customs of London, by the first settlers in Philadelphia under William Penn, and in 1721 the legislature of Pennsylvania passed an act, still in force, regulating in detail the whole subject of party-walls in the city of Philadelphia. Under this act it has been held that the builder's right to compensation for one-half the party-wall is not a lien on the adjoining land, but a mere personal charge against the builder of the second house, and does not run with the land against his assignee: *Ingles v. Bringhurst*, 1 Dallas 341; *Hart v. Kucher*, 5 S. & R. 1. Therefore if the first builder be paid before the second house is built the right to compensation is gone; it is neither a hereditament nor an appurtenance to land and does not pass by a conveyance of the house: *Hart v. Kucher*, 5 S. & R. 1; *Dauids v.*

Harris, 9 Barr 501; *Todd v. Stokes*, 10 Id. 155; *Gilbert v. Drew*, Id. 219.

By statute, however, the right to compensation for use of a party-wall is now made an interest in the realty and passes by a conveyance of the house unless excepted in the deed: Act of 10th April 1849, Pamph. L. 600; *Knight v. Beenken*, 6 Casey 372.

Only a few of the general principles governing party-walls independently of statutory enactments have been discussed in this country.

1. Without a contract or statutory authority no owner has a right to build his wall beyond his own line, and if he does so the adjoining owner may treat it as a trespass and compel it to be taken down, or he may use it as a party-wall without paying anything for it: *Sherverd v. Cisco*, 4 Sandford 480; *Orman v. Day*, 5 Fla. 385. The observations of WOODWARD, J., in *Zugenbuhler v. Gilliam*, 3 Clarke 391, that at common law the adjoining owner by using the wall makes it a party-wall and becomes liable for the value of half the wall, are not supported by authority, as the passage cited from 2 Bouvier's Inst. 178 is based on the statute of Pennsylvania. This case, therefore, except so far as founded on the statute of Iowa, cannot be regarded as sound law.

2. *Primâ facie* the wall and the land on which it stands are held in England to belong to the adjoining owners in moieties as tenants in common, but this presumption is rebutted when the amount of each one's ownership can be ascertained, and each is then owner in severalty of his portion: Gale on Easements 411 (3d London ed.) And the American courts are said to lean towards this latter presumption: *Sherverd v. Cisco*, 4 Sandford S. C. 480. Each half, however, is subject to an easement of support for the other.

3. If two adjoining owners build a wall partly on each lot, and by express

agreement or by continuous use for twenty years, treat it as a party-wall, it becomes a technical party-wall and each has an easement of support for his half: *Webster v. Stevens*, 5 Duer 553.

4. So, if an owner of adjoining lots build upon them a wall partly on each, intended and necessary for the support of both, a conveyance of either house and lot with its appurtenances, grants an easement for the support of the house in so much of the wall as stands upon the other lot: *Eno v. Del Vecchio*, 4 Duer 53; 6 Id. 17.

5. After such a grant and continued use of the wall for twenty years neither can remove the wall or deal with his half so as to impair the support of the other's house: *Eno v. Del Vecchio*, 4 Duer 53; 6 Id. 17; *Potter v. White*, 6 Bosworth 644; *Phillips v. Bordman*, 4 Allen 147. In *Potter v. White*, one who took down a party-wall and built a new one without the consent of the adjoining owner, was held liable for loss of rent, and expenses of repair, &c., made necessary by the removal of the old wall and building of the new. In *Phillips v. Bordman*, the Supreme Court of Massachusetts granted an injunction to restrain one owner of an ancient party-wall from cutting away a portion of its face and erecting a new wall on his own land two inches from that part of the old wall left standing, and connected with it and supporting it by occasional projecting bricks and ties.

And in *Eno v. Del Vecchio*, *ubi sup.*, it was said that if either wishes to change the wall he may do so within the limits of his own lot, provided he does not injure the other, and for such purpose he may shore up the whole wall for a reasonable time while the changes are in progress, but if he does this without the consent of the adjoining owner, he does it at his own peril, as the question of negligence does not come in at all, and no degree of care or skill will relieve

him from liability if injury is actually done.

The Supreme Court of Ohio, however, have held the contrary, and that where owners of adjoining lots build a party-wall by express agreement for the support of their houses, but without any stipulation as to the continuance of the wall, either party or his grantee has a right to take down his part of the wall, after notice and using sufficient care—although it may have been used as a party-wall for twenty-one years; and where the wall fell down, notwithstanding the care, it was held that there was no cause of action: *Hieatt v. Morris*, 10 Ohio State 523.

The rules above enunciated in *Eno v. Del Vecchio* and other cases do not, however, apply to a party-wall built by tenants for years of adjoining lots, so as to affect the reversioners or their grantees: *Webster v. Stevens*, 5 Duer 553. And the right to use the party-wall is only the right to use it *as it has been used*. Thus, A. conveyed a house to B. with a reservation, "the owners on both sides to have mutual use of the present partition-wall." The wall was entirely on the lot conveyed to B., and only a portion of it was used as a partition-wall. A. subsequently conveyed the adjoining lot to C., who enlarged the house and used a greater part of the wall than was so used at the time of the conveyance to B. Held that he was liable to B. for damages in so doing: *Price v. McConnel*; 27 Ill. 255.

6. How long the easement of support acquired by lapse of time or by contract not specifying the term for which it is granted, continues, is still an unsettled question. That it continues so long as the wall remains safe and well adapted to the original purpose, appears to be conceded by all the cases except *Hieatt v. Morris*, 10 Ohio State 523, already cited (*supra* 5). When, however, the wall becomes ruinous and unsafe or unfit for

its purpose of support, either party has a right to take down his half in a skilful manner, after due notice to the other party. And if one-half cannot be taken down without danger, the owner may take down the whole, and such right is not affected by the nature of the use or occupation of the other building: *Campbell v. Mesier*, 4 Johns. Ch. 334; *Partridge v. Gilbert*, 3 Duer 184; s. c., 15 N. Y. 601.

But whether the right of support continues longer than the existence and fitness of the old wall is questionable. In *Campbell v. Mesier*, 4 Johns. Ch. 334, Chancellor KENT appeared to think that the easement was in fee, and where one owner pulled down an ancient party-wall which had become ruinous, and rebuilt it, the Chancellor held the adjoining owner liable to contribute rateably to the expense, provided that if the new wall should be higher or of more expensive material than the old one, the builder should pay the extra expense. But in *Sherrerd v. Cisco*, 4 Sandford 480, it was held that if the wall be destroyed by fire or accident the adjoining owners are not bound to contribute to rebuild it. The land becomes freed from all servitude in relation to the party-wall, as in case of two adjoining lots without buildings. And in *Partridge v. Gilbert*, 3 Duer 184, 15 N. Y. 601, DENIO, C. J., was of opinion that the right to support ceased when the wall became unfit, whether from age or accident, and that each owner was then remitted to his original unincumbered title to the division-line, citing *Sherrerd v. Cisco*, and dissenting from the views in *Campbell v. Mesier*. In the same case, however, SHANKLAND, J., seemed of the contrary opinion, and approved *Campbell v. Mesier*.

7. In regard to the right to compensation for the use of a party-wall, the cases differ. In Pennsylvania, in the cases cited above, it was held, until the Act of 1849, that it was a personal right of

the builder against the person using the wall, and did not run with the land either in favor of the assignee of the first builder or against the assignee of the second builder. To the same effect is the principal case. In New York, however, the decisions are otherwise. Thus, in *Burlock v. Peck*, 2 Duer 90, A., owning two adjoining lots, conveyed one of them with the privilege to the grantee of building a party-wall on the division-line one-half on each lot, and covenanted to pay for one-half the wall when used. A.'s grantee built the wall, and then conveyed to B. A. then conveyed the adjoining lot, and his grantee used the wall. Held, that B. could recover of A. or his executors the value of one-half the wall. And, also, that B. having died after the use of the wall by the grantee of the adjoining lot, the action was properly brought by B.'s administrator, not his heir.

In this case the question of the liability of the grantee of the second lot, who actually used the wall, was not raised, but in *Keteltas v. Penfold*, 4 E. D. Smith 122, a covenant by A. for "himself, his heirs and assigns," to pay for half a party-wall when used, was held to run with the land so as to charge A.'s devisee. And in *Weyman's Ex'rs. v. Ringold*, 1 Bradford 52, a covenant to pay one-half the value of a party-wall when used, to the builder, "his executors or assigns," was held to run with the land in favor of the grantee of the covenantee. In the last case it was expressly agreed that the covenant should bind the lands "and the successive owners thereof," but the surrogate was of opinion that the covenant ran with the land independently of this agreement.

See, also, *Giles v. Dugro*, 1 Duer 331, where A. covenanted with B., his vendee, that the premises sold were clear of "all former or other grants, bargains, and incumbrances whatsoever," but, in

fact, A. had previously conveyed to C. the right to use a wall as a party-wall, and it was held that this was an incumbrance, and the use of the wall a partial eviction of B., who was entitled to re-

cover from A. a sum having the same ratio to the purchase-money as the value of the land so occupied by C. bore to the value of the whole.

J. T. M.

Supreme Court of Pennsylvania.

THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY v. HINDS AND WIFE.

Where a passenger on a railway train is injured by the misconduct of a fellow-passenger, the company is liable only in case there was negligence in its officers in not making proper efforts to prevent the injury.

Railroad companies are bound to furnish men enough for the ordinary demands of transportation, but not a police force adequate to extraordinary emergencies,—as to quell mobs by the wayside.

It is negligence in a conductor to voluntarily admit improper persons or undue numbers into the cars.

Where the evidence shows that an excited crowd, at a way station, among whom were drunken and disorderly persons, rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, it is error in the court to submit that to the jury from which they may find negligence in the conductor in admitting in the cars either improper persons or undue numbers.

In case of fighting or disorder in the cars the conductor must at once do all he can to quell it. If necessary, he should stop the train, call to his aid the engineer, firemen, all the brakemen and willing passengers, lead the way himself and expel the offenders, or demonstrate by an earnest experiment, that the undertaking is impossible.

ERROR to Common Pleas of *Allegheny county*.

The facts and material points raised in the case are fully stated in the opinion.

Hampton, for plaintiff in error.

Marshall, contra.

The opinion of the court was delivered by

WOODWARD, C. J.—The action is for an injury sustained by the plaintiff's wife whilst she was a passenger in the cars of defendant; and what is peculiar in the case is the fact that the injury was not occasioned by defective machinery, or cars, or road, or by anything that pertained properly to their business as